

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR07-1173

ANTHONY WISE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 4, 2009

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT,
[NO. CR-2006-140-2-5]

HONORABLE JODI DENNIS, JUDGE

REVERSED and REMANDED

LARRY D. VAUGHT, Chief Judge

A jury convicted appellant Anthony Wise of possession of a controlled substance with intent to deliver. He was sentenced as a habitual offender and ordered to serve 240 months' imprisonment in the Arkansas Department of Correction. On appeal, Wise argues that the trial court erred by allowing him to waive his right to counsel and represent himself during trial. We agree and reverse.

The Sixth Amendment to the United States Constitution guarantees an accused the right to have the assistance of counsel for his defense. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Article 2, section 10, of the Arkansas Constitution specifically provides that an accused in a criminal prosecution has the right to be heard by himself and his counsel. *Barnes v. State*, 258 Ark. 565, 528 S.W.2d 370 (1975). Furthermore, no sentence involving loss of liberty can be imposed where there has been a denial of counsel. *Philyaw v. State*, 288 Ark. 237, 704 S.W.2d 608 (1986).

In this case, the trial court allowed Wise to discharge his trial counsel (immediately before his trial began) and proceed pro se. As such, we focus our attention on the adequacy of the trial court's admonition to Wise relating to the perils of proceeding pro se, because it is well-settled law that a defendant must knowingly and intelligently waive his right to counsel. *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001). The constitutional minimum for determining whether a waiver was knowing and intelligent is that the accused be made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forego the aid of counsel. *Pierce v. State*, 362 Ark. 491, 209 S.W.3d 364 (2005). Further, “[a] specific warning of the danger and disadvantages of self-representation, or a record showing that the defendant possessed such required knowledge from other sources, is required to establish the validity of a waiver.” *Bledsoe v. State*, 337 Ark. 403, 407, 989 S.W.2d 510, 512–13 (1999). A defendant must “be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Faretta v. California*, 422 U.S. 806, 835 (1975).

In *Bledsoe*, our supreme court further clarified the trial court's charge when a defendant attempts to waive representation. The court reversed a conviction for rape where the trial court allowed the defendant to proceed pro se without specifically making him aware of the ramifications of proceeding pro se. *Id.* As in this case, the *Bledsoe* trial court warned the defendant that he would be required to follow all of the rules and procedures of the court and this would most likely be difficult for him given his lack of formal legal education. *Id.* However, as in this case, the *Bledsoe* trial court never explained to the defendant the

consequences of failing to comply with the rules, such as the inability to secure the admission or exclusion of evidence or the failure to preserve arguments for appeal, and there was no discussion about the substantive risks of proceeding without counsel. *Id.*

Based on these essential omissions, we are convinced that Wise’s waiver was not knowingly made. However, the inquiry does not end here. The State contends that Wise’s “waiver of counsel was rendered moot because of the assistance of standby counsel.” Indeed, the assistance of standby counsel may rise to a level sufficient for us to moot an assertion of involuntary waiver of right to counsel. *Taylor v. State*, 77 Ark. App. 287, 75 S.W.3d 708 (2002). However, we will only do so if the assistance is substantial enough that standby counsel was effectively conducting the defense. *Bledsoe, supra.*

Here, Wise’s standby counsel conducted voir dire, participated in several objections, made a motion on his behalf, assisted with jury instruction, and handled sentencing. However, Wise presented his own opening and closing statements. He cross-examined each State’s witness, moved for a directed verdict, and made several objections. As such, we cannot say that standby counsel “effectively conducted his defense.” *Id.* Because we hold that standby counsel did not participate to such a substantial degree that Wise’s waiver is moot, we must reverse and remand.

Reversed and remanded.

ROBBINS and GRUBER, JJ., agree.